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Attorney for Appellant, DNRC

IN THE SUPREME COURT OF THE STATE OF MONTANA
* * * * * * * * * *

DA 09-0659

C.A. GRENZ,	) Appeal from
	) Cause No. DV-17-2008-2911
Petitioner and Appellee,	) Hon. Gary Day
	) Sixteenth Judicial District
-vs-	)
	)
MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION,	) NOTICE OF APPEAL
	)
Respondent and Appellant,	)
	)
and JOHN AND ANGELA HEITZ,	)
	)
Respondents.	)
	)

Notice is hereby given that the Montana Department of Natural Resources and Conservation ("DNRC"), the above-named Appellant, and the Respondent in that cause of action filed in the Sixteenth Judicial District, in and for the County of Garfield, as Cause No. DV-17-2008-2911, hereby appeals to the Supreme Court of

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MONTANA SIXTEENTH JUDICIAL DISTRICT COURT, GARFIELD COUNTY
* * * * * * * * * *

DA 09-0659

C.A. GRENZ, Petitioner, -vs- MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, and JOHN AND ANGELA HEITZ, Respondents.	Cause No. DV-17-2008-2911 Hon. Gary Day NOTICE AND REQUEST FOR TRANSCRIPT OF HEARING AND TRANSMISSION OF RECORD

TO: The Clerk of Montana's Sixteenth Judicial District Court, Garfield County and to the Court Reporter for Judge Gary Day.

The Respondent, the Montana Department of Natural Resources and Conservation hereby requests that the Clerk of Court transmit the record in the above-captioned matter, including a certified copy of the docket entries, to the Montana Supreme Court on the appeal of this case. The Department also requests a transcript of the full proceedings below in Cause No. DV-17-2008-2911. Please send the transcript and the invoice for payment to: Ms. Lucy Richards, Montana Department of Natural Resources and Conservation, P.O. Box 201601, Helena, Montana 59620.

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Attorney for Appellant, DNRC

DA 09-0659

MONTANA SIXTEENTH JUDICIAL DISTRICT COURT, GARFIELD COUNTY
* * * * * * * * *

C.A. GRENZ, Petitioner, -vs- MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, and JOHN AND ANGELA HEITZ, Respondents.	Cause No. DV-17-2008-2911 Hon. Gary Day NOTICE OF ENTRY OF JUDGMENT

TO: Mr. C.A. Grenz
506 Mississippi
Miles City, MT 59301

PLEASE TAKE NOTICE that final Decisions and Orders were entered in the above-entitled action in favor of the Petitioner, C.A. Grenz by the Court on August 7, 2009 and October 1, 2009. Copies of these final Decisions and Orders are attached hereto.

DATED this 14th Day of December, 2009.

By: _____
Tommy H. Butler
Special Assistant Attorney General
Attorney for Appellant, Montana DNRC

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing NOTICE OF ENTRY OF JUDGMENT was served by mail, postage prepaid, upon the following on the 14th day of December, 2009:

Mr. C.A. Grenz
506 Mississippi
Miles City, MT 59301

Mr. Casey Heitz
Parker, Heitz, & Cosgrove, PLLC
P.O. Box 7212
Billings, MT 59103-7212

Ms. Jennifer Crawford
Clerk of District Court
P.O. Box 8
Jordan, MT 59337-0008

The Hon. Gary Day, District Judge
1010 Main Street
Miles City, MT 59301

MONTANA SIXTEENTH JUDICIAL DISTRICT COURT
GARFIELD COUNTY

C.A. GRENZ, Petitioner, vs. **MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION; and JOHN HEITZ and ANGELA HEITZ,** Respondents.	Cause No. DV-17-2008-2911 *Judge Gary L. Day* ***ORDER REGARDING RESPONDENTS' MOTION TO ENTER JUDGMENT, REMAND, AND DISMISS***

On June 3, 2009, the Respondent in this action, the Montana Department of Natural Resources and Conservation (DNRC), submitted a Motion for Summary Judgment; Petitioner Grenz responded, the DNRC timely replied, and, on July 2, a hearing was held on that motion.

At issue, both in the motion for summary judgment, and in the underlying petition for judicial review, is whether or not certain improvements made to state lands, by the Petitioner during his tenure as lessee, were properly evaluated when he lost his lease and was succeeded by the Respondents Heitz as leaseholders.

On August 7, 2009, the Court issued its order, granting summary judgment with regard to improvements that had been properly considered during the statutory evaluation process mandated by Sections 77-6-302, 77-6-303 and 77-6-306, MCA, but denying summary judgment with regard to certain other improvements that had not been considered during that process. In that order, *inter alia*, the Court (1) declared the second sentence of ARM 36.25.125(3), which

reads "[w]hen the new lessee or licensee does not wish to purchase the moveable improvements and fixtures, then the former lessee or licensee shall remove such improvements immediately," to be invalid, and, (2), ordered a hearing to be set for September 10, 2009, at which time the Court intended to hear evidence which would allow it to ascertain the value of the leasehold improvements that had not been considered during the previous evaluation process.

Thereafter, on August 26, the Respondents Heitz filed a Motion to Enter Judgment, Remand the Matter for Arbitration, and Dismiss the Proceeding, together with a Motion to Stay Scheduling Deadlines. In response to the latter motion, the Court, on August 28, issued an order vacating the September 10 hearing date, in order to allow all parties time to fully brief the issues presented by the motion to enter judgment and remand. Petitioner Grenz responded, the Heitzes replied, and Grenz filed an addition to his earlier response, which, although filed well beyond normal briefing time limits, was considered by the Court in an effort to ensure that Petitioner Grenz, as a *pro se* litigant, had ample opportunity to be fully heard.

The Court, having now considered the briefs of the parties, and the arguments contained therein, and good cause appearing therefrom, now issues the following Memorandum and Order.

MEMORANDUM

The principal issue raised by the motion currently before the Court is procedural—namely, whether the Court itself should hear evidence regarding the value of the improvements that were not considered during the evaluation process, and, based upon that evidence, make a judicial determination of those values, or, alternatively, whether the Court should remand the matter for determination by the DNRC, or by the arbitrators who did not consider the particular improvements in the first place.

The Respondents argue that the evaluation process is mandated by Section 77-6-306, MCA, that the evaluation "must be ascertained and fixed" by the selected arbitrators as provided therein, and they urge this Court, pursuant to Section 2-4-704, MCA, to remand the matter back to the arbitrators.

Petitioner Grenz, on the other hand, relying heavily upon the case of *Evertz v. State of Montana*,[1] suggests that, in the absence of any clear statutory process which would permit a remand back to the arbitrators—or to the DNRC—the Court retains the power to take evidence and make its own evaluation of the improvements in question.

While *Evertz* implies that the reviewing court has the authority to make a value determination pursuant to its judicial review of a DNRC decision in this regard, this Court has been unable to find any direct authority for that proposition—the situation presented by the instant case has, apparently, never been raised, nor considered by the Montana Supreme Court.

The statute itself, Section 77-6-306, MCA, provides little guidance either. It simply indicates that if any party is "dissatisfied with the valuation fixed by the department, the party may . . . petition the district court . . . for judicial review of the decision."[2] Although the DNRC has indicated that the issue before the Court is a "judicial review of DNRC's ***non-MAPA*** determination of value,"[3] absent other statutory authority, this Court is obliged to look to MAPA, and to general principles of administrative law, for insights as to how to proceed at this juncture.

Basically, this Court believes that the scope of its judicial review should be limited to the record placed before it. In this instance, however, there is no record to review: the arbitrators, and then the DNRC, both operating quite properly under the presumption that ARM 36.25.125(3) was valid, simply did not evaluate the improvements that the Heitzes did not want to purchase. Hence there is no record regarding these particular improvements for this Court to review.

While the Heitzes argue that the Court should remand the matter back to the arbitrators for decision, they overlook two issues: first, the decision before the Court is the decision of the DNRC following its review of the arbitrators' evaluation, and there is no mechanism for the Court to remand to the arbitrators. Secondly, notwithstanding the seeming mandatory language of Section 77-6-306, MCA, the arbitrators are not the sole arbiters of value under these

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1 *Evertz v. State of Montana* (1991), 249 Mont. 193, 815 P.2d 135.
2 Section 77-6-306 (4), MCA.
3 St.'s Br. in Support of Its Mot.S.J. 1 (June 3, 2009).

circumstances. The *Winchell* case[4] very clearly states that the DNRC, during its review of arbitrators' evaluations, may substitute values based upon its own evidence and evaluation.

It is most appropriate, then, under the circumstances presented here, to give the DNRC an opportunity to reconsider the valuations of those improvements to the leasehold that were not considered during the original evaluation process, to wit: the new fence on the west side of the section, the water tank, the pump and associated pipe and wiring in the well, and the corral with three gates and a loading chute.

ORDER

NOW, THEREFORE, IT IS ORDERED that this matter be remanded to the Montana Department of Natural Resources to review its decision consistent with this Court's earlier determination that the second sentence of ARM 36.25.125(3) is invalid.

DATED this 15th day of October, 2009.

GARY L. DAY, District Judge

(Court Seal)

cc: Grenz/Heitz/Butler

4 *Winchell v. Mont. Dept. of Nat. Resources*, 1999 MT 11, 293 Mont. 89, 972 P.2d 1132.

MONTANA SIXTEENTH JUDICIAL DISTRICT COURT, GARFIELD COUNTY

C.A. GRENZ, Petitioner, vs. **MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, and JOHN HEITZ and ANGELA HEITZ,** Respondents.	Cause No. DV-17-2008-2911 *Judge Gary L. Day* ***ORDER REGARDING RESPONDENT MDNRC'S MOTION FOR SUMMARY JUDGMENT***

On June 3, 2009, the Respondent in this action, the Montana Department of Natural Resources and Conservation (DNRC), submitted a Motion for Summary Judgment to this Court. On June 18, Petitioner C.A. Grenz filed a response to that motion, and, on July 2, a hearing was held on the motion in the Garfield County Courthouse in Jordan, Montana. The Court, having now considered the evidence submitted, and the written briefs and oral arguments of the parties, and good cause appearing therefrom, now issues the following Memorandum and Order.

MEMORANDUM

Summary of Relevant Undisputed Facts

For some time prior to 1996, John and Angela Heitz had leased from the State of Montana all of Section 16, located in T16N, R43E, Garfield County. When the term of that lease expired, it was re-opened for bidding, and was subsequently awarded to the Petitioner, effective March 1, 1996. At that time, pursuant to state statutes and regulations, the Petitioner purchased various improvements which the Heitzes had placed on that land—2.5 miles of fencing, a water

well, including the casing, and a reservoir or holding pond.

The Grenz lease continued until the end of its 10-year term in February, 2006. At that time, the Heitzes, as high bidders, were re-awarded the lease.

During the period of his leasehold, Mr. Grenz had, with the explicit approval of the DNRC, made some additional improvements to the property: he had constructed a fence along the west side of the section, separating it from the lands owned by the Heitzes in Section 16; he had installed a livestock water tank; he had erected a corral with 3 gates and a loading chute; and, he had installed an electric pump within the well, together with the wiring and tubing associated with that pump.

When the Heitzes reacquired the lease, they and Mr. Grenz attempted to come to an agreement, in accordance with the provisions of Sections 77-6-302 and 77-6-303, MCA, regarding the compensation to be paid to Mr. Grenz for the improvements that had been placed on the property. Apparently, the Heitzes were only interested in reacquiring the improvements that they had made during their earlier tenancy, and were unwilling to pay for the additional improvements to the leasehold that Mr. Grenz had made. Mr. Grenz, on the other hand, sought payment for both the original improvements, *and* for the improvements that he had made.

Unable to reach an agreement, the parties submitted the dispute over the value of the improvements to arbitrators, all in accordance with Section 77-6-306, MCA. On August 11, 2006, the arbitrators issued their report, fixing the total value of the improvements for which Mr. Grenz was to be compensated at $8,370.

However, not all of the improvements at issue were considered by the arbitrators. Because John Heitz had indicated that he only wished to purchase the improvements that he had made to the property during his earlier tenancy, the improvements that Mr. Grenz had made were taken off the table and never considered.

On September 29, 2006, Mr. Grenz appealed the decision of the arbitrators to the DNRC, and, nearly 2 years later, on May 29, 2008, Mr. Kevin Chappell, Agriculture & Grazing Management Bureau Chief for the DNRC, issued his Review of the Arbitrator's [sic] Valuation

of Improvements. That review essentially upheld the decision of the arbitrators, and, relying on ARM 36.25.125(3), upheld the decision of the arbitrators to only consider for arbitration and compensation the improvements that the Heitzes desired to purchase. Thus, despite his desire to sell them, Mr. Grenz was denied compensation for the improvements that he had made to the property, and was directed to remove them from the property within 60 days.

On August 23, 2008, in accordance with Section 77-6-306(4). Mr. Grenz, *pro se*, filed a Petition for Judicial Review of the DNRC's decision; the DNRC responded, and, subsequently, the Heitzes were joined as respondents. On June 3, 2009, the State filed the Motion for Summary Judgment currently before this Court; the Petitioner responded, and a hearing was held on the motion in open court in Jordan, Montana on July 2, 2009.

Discussion

The dispositive issue before the Court regarding this motion, is whether or not the arbitrators, and, on appeal, the DNRC, lawfully refused to consider the value of the improvements that Mr. Grenz had placed upon the leasehold during his tenancy, in particular, the west side boundary fence, the water tank, the corral and loading chute, and the electric pump and its associated wiring and tubing.

Montana's statutory scheme directly addresses the issue at hand. Section 77-6-302(1), MCA, provides as follows:

> Prior to renewal of a lease, the department shall request from the lessee a listing of improvements on the land associated with the lease, including the reasonable value of the improvements. This information must be provided to any party requesting to bid on the lease. When another person becomes the lessee of the lands, the person ***shall*** pay to the former lessee the reasonable value of ***the improvements***. The reasonable value may not be less than the full market value of the improvements. (Emphasis supplied).

In the event that the parties cannot agree on the value of the improvements, the value is then to be determined by arbitration, pursuant to Section 77-6-306, MCA. And that is exactly what happened in the instant case.

Section 77-6-303(1), MCA, provides the criteria by which the value of the improvements is to be ascertained:

> In determining the value of these improvements, consideration ***shall*** be given to their original cost, their present condition, their suitableness for the uses ordinarily made of the lands on which they are located, and to the general state of cultivation of the land, its productive capacity as affected by former use, and its condition with reference to the infestation of noxious weeds. Consideration ***shall*** be given to ***all actual improvements*** and to all known effects that the use and occupancy of the land have had upon its productive capacity ***and desirableness for the new lessee***. (Emphasis supplied).

A plain reading of the two statutes reveals two concepts that are particularly relevant here: first, the language is, in this Court's opinion, mandatory. It does not say "should" or "may." It says "shall." (It is noteworthy, in this regard, that the Montana legislature, in its 2009 session, almost as if it anticipated some less stringent interpretation of the word "shall," amended the statute, replacing the word "shall" with "must." That action does not, however, alter this Court's opinion that the language of the un-amended statute governing this controversy is mandatory, and not discretionary.)

Secondly, the statute lists as one of the considerations in evaluating any improvement, the "desirableness" of the improvement to the new lessee. Unquestionably, "desirableness" of an existing improvement would be an important factor to be considered by a potential lessee in such transactions. But it is only one factor—one, among many—to be weighed in arriving at a "reasonable" value for that improvement. The desirability of the improvement to the new lessee is not the *sine qua non* for the whole evaluation process.

And it is here that the regulation has gone awry.

The DNRC has adopted ARM 36.25.125 to supplement and clarify the statutes regarding improvements on state-owned leaseholds. Of particular importance to the resolution of the case now before the Court is sub-section (3), which provides as follows:

> When the former lessee or licensee wishes to sell improvements and fixtures, and the new lessee or licensee wishes to purchase such improvements and fixtures, and the parties cannot agree upon a reasonable value, such value shall be

> determined by arbitration. ***When the new lessee or licensee does not wish to purchase the movable improvements and fixtures, then the former lessee or licensee shall remove such improvements immediately.*** Extensions for removing these improvements for good cause may be granted by the department. (Emphasis supplied).

The DNRC (and, apparently, the arbitrators) relied upon this regulatory provision to summarily refuse to consider the improvements that Mr. Grenz had placed on the property, simply because John Heitz did not want to pay for them.[12]

Mr. Grenz has argued that the statute is clear, and that *all* improvements should be considered for evaluation, not just those that the new lessee desires to purchase. To the contrary, the DNRC has argued that Mr. Grenz has placed too much emphasis "upon an isolated reading of a single sentence in Section 77-6-302, MCA: '[w]hen another person becomes the lessee of the lands, the person shall pay to the former lessee the reasonable value of the improvements'."[3]

This Court shares Mr. Grenz's opinion. Although the DNRC has argued that the regulation is necessary and important in the broader context of long-standing state-lands leasing laws, and that this Court should not consider the exact words of the statute as controlling, I cannot do that.

Notwithstanding the fact that the Board of Land Commissioners is established by the Montana Constitution,[4] and, as such, is particularly entitled to deference in the interpretation of its rules, there is nothing, Constitutionally or otherwise, that allows it to make rules in contravention of statute, or which expand the scope of a particular statute. And that, it appears to this Court, to be exactly what has happened in the promulgation of ARM 36.25.125(3).

Section 77-6-302(1), MCA, states clearly that the new lessee shall pay to the former lessee the reasonable value of all the improvements on the property associated with the lease.

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[1] Ltr. from Kevin Chappell, Agriculture & Grazing Management Bureau Chief, St. of Mont. Dept. of Nat. Resources and Conserv. 1 (May 29, 2008), attached as Ex. A to Pet. for Jud. Rev. (Aug. 23, 2008).

[2] Report on Improvements Placed on State of Montana Lease # 10159 Garfield County, Montana Arbitration Action 5 (August 11, 2006), attached as Ex. C to Aff. of C.A. Grenz (June 17, 2009).

[3] St.'s Br. in Support of Its Mot.S.J. 9 (June 3, 2009).

[4] Mont. Const. art. X, § 4.

Section 77-6-303(1), MCA, states with equal clarity, that the "desirableness" of the improvements to the new lessee is but one consideration in arriving at the reasonable value of those improvements. ARM 36..25.125(3) effectively alters the plain meaning of the statutes, and allows the new lessee to pick and choose among the improvements on the property, and only select those which he or she desires to purchase. While the shopping cart approach might be convenient to the DNRC and to any new lessee, this Court can find no authority to support the regulation as it is written.

With regard to the improvements to the property which *were* considered by the arbitrators, and reviewed by the DNRC on appeal, this Court can find no error in the methods used for evaluation, nor in the values determined during that process. The arbitration process was undertaken in accordance with law, and the values determined were sufficiently based upon a rational analysis of relevant factors, including the cost of the improvements ascertained in an arbitration proceeding when Mr. Grenz acquired the lease, the cost of repairs made in the interim, and an on-site examination of the current condition of the improvements. The Court concludes that the values determined by arbitration were neither arbitrary nor capricious, and, accordingly, will not be disturbed by this judicial review.

ORDER

NOW, THEREFORE, IT IS ORDERED:

(1) The second sentence of ARM 36.25.125(3) which reads: "When the new lessee or licensee does not wish to purchase the moveable improvements and fixtures, then the former lessee or licensee shall remove such improvements immediately", is in conflict with the underlying statutory authority and is deemed by this Court to be invalid.

(2) The Respondent's Motion for Summary Judgment is granted, but only with regard to the improvements actually subjected to arbitration, to wit: the 2.5 miles of existing fence on the north, east, and south sides of the property; the well; and the small reservoir or holding pond.

(3) The Respondent's Motion for Summary Judgment is denied with regard to the improvements which were not subjected to arbitration, to wit: the new fence on the west side of the property, the water tank, the pump and its associated tubing and wiring, and the corral, gates and loading chute.

(4) This Court shall conduct a hearing on the **10th** day of **September, 2009**, at the hour of **10:00** o'clock **a**.m. at the Garfield County Courthouse in Jordan, Montana, for the sole purpose of ascertaining the values of the improvements noted above that have not been subjected to arbitration and evaluation. At that hearing, the respective parties may present such evidence as they feel relevant and helpful to this Court in making its determination.

DATED this 7th day of August, 2009.

GARY L. DAY, District Judge

(Court Seal)

Cc: Grenz/Butler/Heitz